



Pietro Vito

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hydro Research Science, Inc.--Claim for Costs
File: B-228501.3
Date: June 19, 1989

DIGEST

1. Amounts claimed for costs of filing and pursuing protest and for proposal preparation may be recovered to the extent that they are adequately documented and not shown to be unreasonable. To the extent that the claim is not adequately documented, claimant is not entitled to recovery.
2. Where improperly awarded contract is terminated and protester has opportunity to compete for remaining contract work, recovery of proposal preparation costs is limited to that amount that relates to the portion of the contract work for which protester was deprived of the opportunity to compete.
3. Request for payment of costs of pursuing claim is denied since such costs are not reimbursable.

DECISION

Hydro Research Science, Inc., requests that the General Accounting Office (GAO) determine the amount it is entitled to recover from the United States Army Corps of Engineers for proposal preparation costs under request for proposals (RFP) No. DACW07-87-R-0049 and for the costs of filing and pursuing its protest. We determine that Hydro is entitled to recover total costs of \$40,031.22 as discussed below.

In its initial protest, Hydro protested the award of a contract to Hydronetics, Inc., for the operation and maintenance of the San Francisco Bay/Delta Model. Hydro argued that the Corps improperly evaluated proposals, failed to follow the RFP evaluation scheme, improperly awarded a contract to the high-priced offeror and was biased against Hydro. An agency report and comments were subsequently filed with our Office. We dismissed the protest as academic, because, before we could resolve the matter, the Corps informed us that due to flaws in the procurement it would terminate the contract and competitively resolicit the

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RFP requirements. Upon reconsideration, we found that the protest should not have been dismissed since the protester was entitled to the recovery of its proposal preparation and protest costs, because it had lost the opportunity to compete for a significant portion of the work performed under the terminated contract. Hydro Research Science, Inc.--Reconsideration, B-228501.2, Apr. 29, 1988, 88-1 CPD ¶ 418.

The protester seeks a total of \$63,334.10, consisting of \$42,606.01 in protest costs and attorneys' fees, \$13,553.36 in proposal preparation costs, and \$7,174.73 in the costs of pursuing its claim. The Corps offered to pay Hydro the amount of \$9,262 in reimbursement of Hydro's proposal preparation and protest costs. Because the agency and the protester have been unable to reach any agreement concerning the amount of Hydro's claim, Hydro requested that we determine the amount it is entitled to be reimbursed. 4 C.F.R. § 21.6(f) (1987).^{1/}

The Corps argues that Hydro is only entitled to recover \$9,262, which is the amount of profit Hydro would have received on the portion of the contract award for which Hydro was deprived of competing. The Corps reasons that since we found Hydro to be entitled to the award of costs because Hydro had been deprived of the opportunity to compete for a significant portion of the contract award, Hydro should only be allowed to recover the profit it would have received on that portion of the award. The Corps contends that it would be unreasonable for Hydro's recovery of costs to exceed this amount.

We do not agree that Hydro's recovery of reasonable protest and proposal preparation costs is limited to its lost profits on the portion of the contract for which the protester lost the opportunity to compete. The reasonableness of claimed costs is determined in the context of what a prudent person would incur in the preparation of a proposal and pursuit of a protest. See Federal Acquisition Regulation (FAR) § 31.201-3 (FAC 84-26). However, we conclude that Hydro is not entitled to recover all of its costs of proposal preparation because Hydro had the opportunity to compete for the remaining contract requirements under the resolicitation. Our purpose in awarding proposal preparation costs is to compensate an offeror who had incurred costs in proposal preparation but had not had a fair

^{1/} The protest, out of which this claim arose, was filed on October 13, 1987, prior to the effective date of our current Bid Protest Regulations.

opportunity to compete for award. Here, Hydro had the opportunity to use its proposal to compete for award of the remaining contract work. However, since Hydro lost the opportunity to compete for a portion of the work performed under the terminated contract, we find Hydro to be entitled to recover its reasonable costs of proposal preparation that relate to that completed portion of the contract work.

We do not find that Hydro's recovery of protest costs is similarly limited. The recovery of protest costs is allowed in order "to relieve parties with valid claims of the burden of vindicating the public interests which Congress seeks to promote." See Computer Lines, GSBCA No. 8334-C, Oct. 9, 1986, 86-2 BCA ¶ 19,403. By awarding Hydro that portion of its reasonable costs of proposal preparation that relates to the portion of the contract work for which it was deprived, we have placed Hydro in as good a position as it was prior to the original competition. However, the opportunity to compete for the remaining contract work would not compensate Hydro for its out-of-pocket expenses in filing and pursuing its protest. Thus, we see no purpose in restricting the award of protest costs to the proportion of the award for which the protester was deprived of competing.

PROTEST COSTS

Of the \$42,606.01 claimed for the costs of filing and pursuing the protest, Hydro requests reimbursement of \$15,544.96 for its attorneys' fees. The claimed attorneys' fees are documented by total monthly billing statements and summary statements, which identify the specific time spent on the protest. Of the \$15,544.96 requested, the Corps has questioned costs in the amount of \$1,225.06. The Corps argues that these costs represent time spent before the award of the contract to Hydronetics and attorney time spent in conferences with Hydro's congressman. The Corps does not otherwise question the hours or hourly rates of Hydro's attorneys.

We agree with the Corps that Hydro should not be reimbursed for attorney time expended prior to the award of the contract to Hydronetics when Hydro did yet not have a basis for protest. We also find that Hydro should not be reimbursed for attorney time spent other than in pursuing the protest at GAO. Accordingly, we find that Hydro is not entitled to recover \$1,225.06 in reimbursement of these claimed costs. Further, we question an additional \$265.33 of costs which appear to relate to Hydro's protest on the

resolicitation of the RFP requirements. See Hydro Research Science, Inc., B-230208, May 31, 1988, 88-1 CPD ¶ 517. Accordingly, we find Hydro is entitled to reimbursement of \$14,054.57 for its attorneys' fees.

Hydro claims an additional \$27,061.05 for the costs of pursuing the protest. This amount consists of \$25,603.55 for salaried employees, \$1,237.50 for an outside consultant/writer, and \$220 for documentation. Hydro calculated the costs of its salaried employees by identifying the hours worked by each employee, developing an hourly rate for each employee, and then burdening the product of the hours worked multiplied by the hourly rate. Hydro applied an indirect costs burden rate of 137.67 percent for Overhead/general and administrative (G&A) and 33 percent for fringe benefits.

The Corps does not question Hydro's hourly rates or that the hours claimed were actually incurred but argues that the number of hours claimed for Hydro's employees is unreasonable. Hydro responds that the number of hours is reasonable considering the procedural history of the protest. We conclude from our review of the record that Hydro is entitled to recover 296 hours of the 342 hours it claims for employees' time in supporting its lawyers in the pursuit of the protest. We calculated that Hydro was entitled to reimbursement for these hours by reviewing the employees' time sheets to determine when the hours were incurred and for what purposes.

We disallow reimbursement for 46 hours of direct labor, consisting of 23.5 hours that were incurred before Hydro had a basis for protest and 22.5 hours that were incurred in relation to Hydro's protest of the resolicitation of the contract requirements. See Hydro Research Science, Inc., B-230208, supra. We note that 88 hours were incurred by Hydro's president and vice president at times during the protest that caused us to question whether a prudent person would incur costs of this nature and amount in the pursuit of its protest. For example, the president incurred 60 hours between the date Hydro filed its bid protest and the date Hydro received the agency report. However, the record reflects that Hydro's legal counsel had consultations with the protester's president and vice president during this period, and the agency does not question the nature and amount of these costs other than to generally assert that Hydro's claim for employees' time is excessive. Accordingly, we have allowed the 88 hours as a part of the 296 hours that Hydro is entitled to recover for its

employees' time in pursuit of the protest. See Princeton Gamma-Tech, Inc.--Claim for Costs, B-228052.5, Apr. 24, 1989, 89-1 CPD ¶ ____.

The Corps also questions Hydro's indirect cost rates. The Corps states that Hydro has failed to show what portion of the indirect cost rates can be attributable to the preparation of its proposal. However, indirect costs are not costs which are allocable to a single objective, such as proposal preparation. See FAR § 31.203(a). Hydro's accountant states that the indirect cost rates used represent the actual historical rates for the year incurred and that all costs directly related to the preparation of the proposal and the pursuit of the proposal, such as staff and management labor, have been removed from the indirect costs rate. We find that 137.67 percent for overhead/G&A and 33 percent rate for fringe benefits is reasonable.

We find that Hydro is entitled to be reimbursed the amount of \$22,967.35 for the costs of its employees in pursuing the protest. We calculated that Hydro is entitled to be reimbursed the sum of \$8,485.37 for the direct salary costs of its employees, consisting of \$6,258 for the costs of its president, \$1,020 for the costs of its vice president and \$1,207.37 for the costs of its staff employees. We burdened the \$8,485.37 by indirect costs at the rate of 137.67 percent for overhead/G&A and 33 percent for fringe benefits to arrive at the \$22,967.35 figure that Hydro is entitled to recover.

We find that Hydro is not entitled to be reimbursed for the \$1,237.50 in costs of its consultant/writer or the \$220 in documentation costs. Hydro has not provided documentation describing or explaining the services rendered by this consultant in the pursuit of the protest. In addition, Hydro has not submitted any documentation to support its claim for \$220 in documentation costs. The burden is on the protester to submit sufficient evidence to support its claim, and this burden is not met by unsupported statements that the costs have been incurred. Malco Plastics, B-219886.3, Aug. 18, 1986, 86-2 CPD ¶ 193.

Accordingly, we find that Hydro, for its cost of filing and pursuing its protest, is entitled to recover a total of \$37,021.92 consisting of \$14,054.57 for attorneys' fees and \$22,967.35 for the costs of employees.

PROPOSAL PREPARATION COSTS

Hydro also requests reimbursement of \$13,553.36 for the costs of proposal preparation. Hydro calculated this amount

by finding that it had incurred salary costs in the amount of \$4,345.94, which it burdened at the rate of 137.67 percent for overhead/G&A and 33 percent for fringe benefits to total \$11,763.16 for its labor costs. To this amount, Hydro added \$1,675 for the costs of a consultant/writer and costs of \$115.20 for photographs and proposal copying.

The Corps only questions \$69.80 of employee costs, which were incurred after the date on which proposals were due. We agree with the Corps that this amount should not be allowed. We find that Hydro's reasonable cost of proposal preparation consists of \$11,574.23, which represents \$4,276.14 for the salary costs of its employees burdened by its indirect cost rates. We do not find Hydro to be entitled to the \$1,675 of costs for its consultant/writer or the \$115.20 costs for proposal copying and photographs because these costs are not sufficiently documented. Malco Plastics, B-219886.3, supra.

As noted above, Hydro is only entitled to recover its reasonable costs of proposal preparation that relate to the portion of the contract work for which Hydro lost the opportunity to compete. Since Hydro lost the opportunity to compete for 26 percent of the contract work, see Hydro Research Science, Inc.--Reconsideration, B-228501.2, supra, we conclude that Hydro is entitled to reimbursement of 26 percent of its reasonable proposal preparation costs or \$3,009.30.

CLAIM COSTS

Hydro also claims \$7,174.73 for the costs of pursuing its claim. We have found, however, that the costs of pursuing a protester's claim for costs are not reimbursable. Introl Corp., 65 Comp. Gen. 429 (1986), 86-1 CPD ¶ 279.

CONCLUSION

Based on the foregoing, we determine that Hydro is entitled to recover total costs of \$40,031.22, consisting of \$37,021.92 for the costs of filing and pursuing its protest and \$3,009.30 for the costs of its proposal preparation.



Acting Comptroller General
of the United States